UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

BOBBY F. FISHER, JR.,	**CASE NO. 05-18725-NPO**
DEBTOR.	**CHAPTER 7**
FIRST AMERICAN TITLE INSURANCE COMPANY	**PLAINTIFF**
VS.	**ADV. PROC. NO. 06-01043-NPO**
BOBBY F. FISHER, JR.	**DEFENDANT**

MEMORANDUM OPINION AND ORDER GRANTING MOTION OF FIRST AMERICAN TITLE INSURANCE COMPANY FOR SUMMARY JUDGMENT IN PART; DENYING MOTION FOR DEFAULT JUDGMENT; AND SETTING FURTHER HEARING

There came on for consideration the Motion of First American Title Insurance Company for Summary Judgment (the "Motion") (Adv. Dk. No. 18) filed by the Plaintiff, First American Title Insurance Company ("First American"), in the above-styled adversary proceeding (the "Adversary"). The Defendant, Bobby F. Fisher, Jr.[1] (the "Debtor"), did not file a response to the Motion. First American is represented by Richard A. Montague, Jr., and the Debtor is represented by David M. Holly. The Court has considered the Motion, the Memorandum of Law in Support of the Motion ("Memorandum") (Adv. Dk. No. 18, Ex. 5), and First American's List of Undisputed

[1] Although the pleadings sometimes include Loan Closing Services Corporation (LCSC) as a defendant, it is evident that First American's Complaint to Determine the Dischargeability of the Debt to First American Title Company Under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4) (the "Complaint") (Adv. Dk. No. 1), as well as its Motion, are against the Debtor alone. The discrepancies appear to be due to scrivener's errors.

Material Facts ("First American's Statement of Facts") (Adv. Dk. No. 18), together with the pleadings in the Court files. As a result, the Court finds that no genuine issue of material fact exists as to the Debtor's liability for actual damages to First American and that, consequently, First American is entitled to judgment as a matter of law in regard to that issue. The Court also finds that the Debtor's liability for actual damages to First American is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).[2] The Court further finds that a separate hearing should be held to determine 1) the amount of actual damages to be awarded to First American; 2) whether First American is entitled to compensatory damages in the form of interest; 3) whether First American is entitled to punitive damages in the form of attorneys' fees; 4) whether any compensatory and/or punitive damages awarded to First American are nondischargeable pursuant to 11 U.S.C. § 523(a)(4); and 5) the form of the judgment to be entered given the confidential nature of certain aspects of the Motion.[3]

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), and (O). Notice of the Motion was proper under the circumstances.

Summary Judgment Standard

Federal Rule of Civil Procedure 56, made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056, states that summary judgment is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the pleadings,

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[2] Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

[3] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Thus, the moving party bears the initial responsibility of informing the Court of the basis for its motion, and of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). If the moving party bears the burden of proof on the claim upon which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure all of the essential elements of the claim." Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).

Once the moving party has met its burden, the burden shifts to the nonmovant to show summary judgment should not be granted. Fields v. City of South Houston, Tex., 922 F.2d 1183, 1187 (5th Cir. 1991). The nonmovant must go beyond the pleadings and, by its own affidavits or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing a genuine issue for trial. Celotex Corp.v. Catrett, 477 U.S. at 324. If the nonmovant entirely fails to respond to a motion for summary judgment, the court may accept the movant's evidence as undisputed, and must determine whether the movant has made a prima facie showing of its entitlement to summary judgment based on the undisputed evidence. Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1988); Vega v. Parsley, 700 F. Supp. 879, 881 (5th Cir.1988); Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985).[4]

[4] First American also filed a Motion for Default Judgment (Adv. Dk. No. 24) against the Debtor. Based on the Court's decision to grant summary judgment, the Motion for Default Judgment is moot and should be denied.

Facts

The following facts have been established by First American's Statement of Facts and the Court files:

1. On or about January 26, 2001, First American and LCSC entered into a Title Insurance Agency Agreement (the "Agency Agreement"). The Agency Agreement was executed by the Debtor who, at all relevant times, was the sole shareholder and president of LCSC, as well as an attorney licensed to practice in Mississippi. Pursuant to the terms of the Agency Agreement, First American designated LCSC as its agent to issue policies of title insurance and, in general, to act as its agent in transacting other title insurance business.

2. The Debtor, as closing attorney for LCSC, closed all of the mortgage loans identified in the Affidavit of Tricia D. Cohen (the "Cohen Affidavit") (Adv. Dk. No. 18, Ex. G), and the Ruthie M. Stampley mortgage loan, identified in documents submitted to the Court under seal[5] (collectively, the "Loan Closings"). LCSC issued title insurance policies with regard to each of the Loan Closings.

3. In connection with each of the Loan Closings, the Debtor received funds belonging to First American's insured lenders, which he held in his attorney trust account. The funds were to be used to pay off prior mortgages, purchase insurance, pay taxes, and pay various other fees. Pursuant to the terms of the Agency Agreement, First American's accounting procedures were to be followed in connection with the collection and disbursement of those funds entrusted to the Debtor. Moreover, in regard to each Loan Closing, LCSC executed a certificate which stated that the loan had been closed properly and that the required disbursements had been made.

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[5] Order Authorizing Filing of Documents Under Seal (Adv. Dk. No. 27).

4. On April 12, 2002, First American terminated the Agency Agreement with LCSC. First American thereafter conducted an audit of the Debtor's and LCSC's files, records, and escrow accounts. The audit revealed that in connection with each of the Loan Closings, funds which had been deposited into the Debtor's attorney trust account had not been used for the purposes required by the closing instructions or as certified by LCSC, but had been misappropriated or mishandled by the Debtor. That is, the Debtor had falsified mortgage loan documents in order to obtain mortgage loans for borrowers, had failed to distribute the mortgage loan proceeds in accordance with the closing instructions from the lenders, and had withheld and converted some of the mortgage loan proceeds for his own use. It is undisputed that First American had no knowledge of the Debtor's activities.

5. Based on the audit and escrow account shortages, First American paid various claims, as reflected on the Cohen Affidavit, made on title insurance policies issued by LCSC. An additional sum was paid by First American in the confidential settlement of an action entitled Ruthie M. Stampley v. Wells Fargo, No. 2002-157, filed in the Circuit Court of Jefferson County, Mississippi (the "Stampley Settlement"), as reflected in the documents submitted to the Court under seal.

6. The Debtor thereafter plead guilty to a two count federal information, charging him with a wire fraud conspiracy, in violation of 18 U.S.C. § 371,[6] and engaging in a monetary transaction in property derived from a specified unlawful activity, that is wire fraud, in violation of

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[6] 18 U.S.C. § 371 provides, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1957.[7] *See* Memorandum at Exhibits 3 and 4.

7. Subsequently, on October 13, 2005, the Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code (Dk. No. 1).

8. First American then initiated the Adversary by filing its Complaint wherein it requests that this Court find that the Debtor is liable to First American for the actual damages as delineated in the Cohen Affidavit and the Stampley Settlement, together with punitive damages in the form of attorneys' fees, and interest. First American further requests that this Court find that the debt is nondischargeable because the Debtor obtained money, property, or services by false pretenses, false representations, or actual fraud pursuant to § 523(a)(2)(A), or engaged in fraud or defalcation while acting in a fiduciary capacity, or committed embezzlement or larcency pursuant to § 523(a)(4), with regard to the Loan Closings.

9. The Debtor filed an Answer to the Complaint Objecting to Dischargeability of a Certain Debt (the "Answer") (Adv. Dk. No. 4), wherein he generally denies the allegations set forth in the Complaint.

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[7] 18 U.S.C. § 1957 provides, in pertinent part:

> (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).
> . . . .
> (Continued on Page 6).
> (Continued from Page 5).
>
> (d) The circumstances referred to in subsection (a) are - -
>
> > (1) that the offense under this section takes place in the United States . . . .

10. First American thereafter filed the Motion currently before the Court.[8]

Discussion

1. The Debtor's Liability for Actual Damages to First American.

In support of its claim that the Debtor is liable for actual damages to First American, First American has presented two documents: 1) the Cohen Affidavit and 2) the Stampley Settlement. Cohen, the Senior Auditor for First American, stated in her Affidavit that she had conducted an audit of the Debtor's files wherein she had found many instances where the Debtor had failed to make payments as required by the closing instructions he had received from mortgage lenders. Cohen then identified each of the Loan Closings in which First American has paid claims related to the Debtor's actions. First American also presented documents which establish the amount paid in regard to the Stampley Settlement. The Cohen Affidavit and the Stampley Settlement documents are undisputed by the Debtor.

The Court finds that First American has established that the Debtor is liable for actual damages to First American[9] for its payment of the claims identified in the Cohen Affidavit and the confidential Stampley Settlement amount. *See* 28 U.S.C. § 157(b)(1) (bankruptcy judges may hear and determine all core proceedings and enter appropriate orders and judgments).

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[8] On May 30, 2007, an Order Dismissing Motions for Failure to Comply with Order (the "Dismissal Order") (Adv. Dk. No. 28) was entered based on First American's failure to submit certain documents under seal as previously ordered by the Court (Adv. Dk. No. 27). Upon First American's compliance in filing the documents under seal, the Dismissal Order was set aside and an Order Reinstating the Motion was entered on August 1, 2007 (Adv. Dk. No. 36).

[9] First American is subrogated to the rights of its insured lenders. *See* Discussion, § 2, ¶ B herein.

2. The Nondischargeability of the Debt to First American Pursuant to § 523(a)(4).[10]

Section 523(a)(4) provides, in pertinent part:

> (a) A discharge under section 727, . . . does not discharge an individual debtor from any debt - -
>
> > (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . . .

11 U.S.C. § 523(a)(4). The plaintiff seeking to deny a debtor the discharge of a debt pursuant to § 523(a)(4) must prove by a preponderance of the evidence that the debt is nondischargeable. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1292 (5th Cir.1995). Thus, First American bears the burden of proving each element of § 523(a)(4) by a preponderance of the evidence. *See* Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).

A. Fraud or Defalcation While Acting in a Fiduciary Capacity

For a debt to be denied a discharge based on a debtor's fraud or defalcation while acting in a fiduciary capacity, "the plaintiff must show that 1) the debtor was acting in a fiduciary capacity towards the plaintiff, 2) the debtor was involved in a fraud or defalcation involving the plaintiff, and 3) his or her debt arose from the debtor's fraud or defalcation." Barcelona v. Vizzini (In re Vizzini), 348 B.R. 339, 346 (Bankr. E.D. La. 2005) (citing Angelle v. Reed (In re Angelle), 610 F.2d 1335, 1338-41 (5th Cir. 1980)). Addressing the first element, whether the Debtor was acting in a fiduciary capacity, the Court of Appeals for the Fifth Circuit has stated, "[T]he concept of fiduciary under § 523(a)(4) is narrower than it is under the general common law. Under § 523(a)(4), 'fiduciary' is

[10] In finding the debt nondischargeable pursuant to § 523(a)(4), the Court need not address First American's remaining arguments.

limited to instances involving express or technical trusts." Miller v. J.D. Abrams, Inc. (In re Miller), 156 F.3d 598, 602 (5th Cir. 1998) (quoting Texas Lottery Comm'n v. Tran (In re Tran), 151 F.3d 339, 342 (5th Cir. 1998)). While the attorney-client relationship clearly is a fiduciary one, *see* Lee v. Walmart Stores, Inc., 943 F.2d 554, 558 (5th Cir. 1991) and In re Estate of Smith, 827 So.2d 673 (Miss. 2002), "[t]he fiduciary obligation of the lawyer [also] applies to persons who, although not strictly clients, he has or should have reason to believe rely on him." Chicago Title Ins. Co. v. Goldberg (In re Goldberg), 12 B.R. 180, 183 (Bankr. N.J. 1981); *see also* First American Title Ins. Co. v. Eberhart (In re Eberhart), 283 B.R. 97, (Bankr. D. Conn. 2002) (express trust created when attorney, acting as escrow agent in mortgage refinance transaction, accepted loan proceeds; conduct of parties demonstrated loan proceeds to be maintained by escrow agent in a fiduciary capacity). The Debtor knew, or should have known, that First American's insured lenders and First American relied on him, as an escrow agent, to pay off prior mortgages, purchase insurance, pay taxes, and pay various other fees in connection with the Loan Closings. Accordingly, First American has established that the Debtor was a fiduciary of First American.

In addition, First American must prove the second element, that the Debtor was involved in a fraud or defalcation involving First American. Pursuant to his guilty plea, the Debtor misappropriated to his own use funds held in trust by him which were supposed to have been used to satisfy various obligations insured by First American. Consequently, First American has demonstrated the second element.

First American also must establish the last element, that its debt arose from the Debtor's fraud or defalcation. In this case, the Cohen Affidavit and the Stampley Settlement establish that the debt to First American arose from the Debtor's fraudulent actions. Thus, First American has

demonstrated by a preponderance of the evidence that the debt is nondischargeable for fraud or defalcation while acting in a fiduciary capacity pursuant to § 523(a)(4).

B. Embezzlement

Alternatively, the debt to First American is nondischargeable pursuant to § 523(a)(4) on the basis of the Debtor's embezzlement.[11] For purposes of § 523(a)(4), embezzlement is defined as "[t]he fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come . . . . " In re Wells, 368 B.R. 506, 514 (Bankr. M.D. La. 2006). As noted previously, the Debtor lawfully received funds from First American's insured lenders to pay off prior mortgages, purchase insurance, pay taxes, and pay various other fees. The Debtor deposited those funds into his attorney trust account, but subsequently converted some of them to his own use. Thus, the Debtor embezzled from First American's insured lenders that were involved in the Loan Closings. First American, as the lenders' insurer, paid claims based on the Debtor's fraudulent conduct and as a result, is subrogated to the rights of those lenders. *See* In re Covino, 12 B.R. 876, 877 (Bankr. M.D. Fla. 1981) ("where one secondarily liable is called upon to make good on his obligation and pays the debt, he steps into the shoes of the former creditor. He becomes subrogated to all the rights of the creditor against the principal debtor . . . ."). Accordingly, in that the debt would be nondischargeable pursuant to § 523(a)(4) based on the Debtor's embezzlement from First American's insured lenders, the debt also is nondischargeable on the same basis as to First American. *See*, e.g., Old Republic Surety Co. v. Richardson, 193 B.R. 378, 382

[11] "The phrase 'while acting in a fiduciary capacity' clearly qualifies the words 'fraud or defalcation' and not 'embezzlement' or 'larceny'; the implication is that the discharge exception applies even when the embezzlement or larceny was committed by someone not acting as a fiduciary." 4 Collier on Bankruptcy, ¶ 523.10[1][d] (Matthew Bender 15th Ed. Rev. 2006).

(D.D.C. 1995) (surety was entitled to all rights and remedies against debtor under the Bankruptcy Code that trust beneficiaries could have asserted, including the right to object to dischargeability of debts).

Conclusion

Based on the foregoing, the Court finds that the Motion is well taken and should be granted as to the Debtor's liability for actual damages to First American. The Court further finds that the Debtor's liability for actual damages to First American is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). The Court further finds that a separate hearing should be held to determine 1) the amount of actual damages to be awarded to First American; 2) whether First American is entitled to compensatory damages in the form of interest; 3) whether First American is entitled to punitive damages in the form of attorneys' fees; 4) whether any compensatory and/or punitive damages awarded to First American are nondischargeable pursuant to 11 U.S.C. § 523(a)(4); and 5) the form of the judgment to be entered given the confidential nature of certain aspects of the Motion. Lastly, the Court finds that the Motion for Default Judgment is moot and should be denied.

A separate final judgment on liability and damages will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021 upon the conclusion of the hearing on damages and the form of the judgment.

IT IS, THEREFORE, ORDERED that the Motion is granted in part as to the Debtor's liability for actual damages to First American.

IT IS FURTHER ORDERED that a hearing shall be conducted to determine the issues regarding damages owed by the Debtor to First American as set forth herein and the form of the judgment. The Court shall schedule the hearing.

IT IS FURTHER ORDERED that the Motion for Default Judgment is denied.

SO ORDERED, this the 1st day of October, 2007.

/s/ Neil P. Olack
NEIL P. OLACK
U.S. BANKRUPTCY JUDGE